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MEMORANDUM FOR CHIEF, CRIMINAL INVESTIGATION

FROM:  Nancy J. Jardini
Division Counsel/Associate Chief Counsel (Criminal Tax)

SUBJECT: Investigating I.R.C. § 6050I and 31 U.S.C. § 5331 Violations
Under Section 365 Of The Patriot Act

This responds to your request for guidance regarding how violations of I.R.C. § 6050I and 31 U.S.C. § 5331 should be investigated.¹ The reporting requirements between the two reporting regimes are minimal. There are differences in terms of penalties, sentencing guidelines, statute of limitations, referral path, disclosure limitations, and forfeiture. The determination of which statute to use to investigate Form 8300 reporting violations will require a balancing of these differences.

Discussion

The Treasury Department issued an interim rule and companion notice of proposed rulemaking to add a new provision to its regulations under the Bank Secrecy Act. The new regulations implement Section 365 of the Patriot Act, which requires trades and businesses to report cash transactions of more than \$10,000 (or two or more related transactions involving more than \$10,000) as well as certain transactions involving monetary instruments to Treasury's Financial Crimes Enforcement Network ("FinCEN"). This is a dual reporting requirement, as it is analogous to reports currently required to be filed with the Internal Revenue Service ("IRS").²

¹ Section 365 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("Patriot Act"), Public Law 107-56 (115 Stat. 272), amended the Bank Secrecy Act ("BSA") by adding 31 U.S.C. § 5331.

² See I.R.C. § 6050I, which also requires trades and businesses to report cash transactions of more than \$10,000 (or two or more related transactions involving more than \$10,000) as well as certain transactions involving monetary instruments to the IRS. It is noted that whereas § 6050I reporting requirements includes court clerks within the
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CC:CT:NO-169331-01

Trades and businesses required to report this information will do so using Amended Form 8300, jointly prescribed by FinCEN and the IRS. There is no dual filing requirement, and there are no new reporting or record keeping requirements. The method of filing Forms 8300 remains the same; that is, those who are required to file Forms 8300 will mail them to the Detroit Computing Center and that information will then be entered into the IRS database, CBRS. The IRS will then forward a computerized extract of the information collected on the Form 8300 to FinCEN, and that information will be entered into the FinCEN sourced database, TECS.

Since the IRS has investigatory jurisdiction over both the Internal Revenue Code and Title 31³, the question has arisen as to which statute special agents should use to conduct their investigations with respect to cash reporting violations. To address this question, we have analyzed each statute based on penalties, sentencing guidelines, statute of limitations, referral path, disclosure limitations and forfeiture.

Penalties

The Form 8300 satisfies reporting requirements for two separate statutes; therefore, there are two potential criminal violations.⁴ The penalties for § 6050I involving failure to file Forms 8300 are found under I.R.C. § 7203, which provides a maximum fine of

²(...continued)

definition of a trade or business, § 5331 does not. Additionally, only § 6050I requires the filer to provide notice of filing to the person whose transaction was the subject of the filing.

³ Pursuant to 31 C.F.R. § 103.56(c)(2) and Treasury Directive 15-41, the Commissioner of Internal Revenue has the authority to initiate investigations for possible criminal violations of 31 C.F.R. § 103, Financial Recordkeeping and Reporting of Currency and Foreign Transactions (except for violations of 31 C.F.R. § 103.23, which pertain to CMIR violations). Since this Treasury Directive is broadly drafted to include all criminal violations under Title 31, except as mentioned above, it does not need to be amended to incorporate 31 U.S.C. § 5331 specifically.

⁴ It is important to note an individual may not be tried for two separate crimes that contain the same elements. "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304, 76 L. Ed. 306, 52 S. Ct. 180 (1932). The Blockburger test has been applied to delineate the scope of the Fifth Amendment's Double Jeopardy Clause, which prevents multiple or successive prosecutions for the "same offense." Texas V. Cobb, 532 U.S. 162, 173 (2001). [REDACTED]

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CC:CT:NO-169331-01

\$250,000 (\$500,000 in the case of a corporation), or a maximum term of imprisonment of five years, or both.⁵ Furthermore, the penalties for filing false Forms 8300 are found under I.R.C. § 7206, which provides a maximum fine of \$100,000 (\$500,000 in the case of a corporation), or a maximum term of imprisonment of three years, or both.⁶

The penalties for Title 31 violations, including new § 5331, are found under 31 U.S.C. § 5322, and provide a maximum fine of \$250,000, or a maximum term of imprisonment of five years, or both. Additionally, if the § 5331 violation occurs during a violation of another law of the United States, or as a pattern of any illegal activity involving more than \$100,000 within a twelve month period, § 5322(b) provides for a maximum fine of \$500,000 or a maximum term of imprisonment of 10 years, or both.

Sentencing Guidelines

The Sentencing Guidelines provision is the same for both § 6050I violations and § 5331 violations. U.S.S.G. § 2S1.3 applies to the following violations: structuring transactions to evade reporting requirements; failure to report cash or monetary transactions; failure to file currency and monetary instrument reports; and knowingly filing false reports. The background statement under the Commentary of § 2S1.3 provides, "[t]he offenses covered by this guideline relate to records and reports of certain transactions involving currency and monetary instruments. These reports include Currency Transaction Reports, Currency and Monetary Instrument Reports, Reports of Foreign Bank and Financial Accounts, and Reports of Cash Payments Over \$10,000 Received in a Trade or Business." U.S.S.G. § 2S1.3, commentary.

Statute of Limitations

The statute of limitations for § 6050I involving the failure to file Forms 8300 is three years. See I.R.C. § 6531(4). Where the § 6050I violation involves filing false Forms 8300, the statute of limitations is six years. See I.R.C. § 6531(5). There is no specific provision for statute of limitations under Chapter 53 of Title 31; therefore, the general statute of limitations provision of five years under 18 U.S.C. § 3282 applies to § 5331 violations.

⁵ We note that the penalty for failure to file a Form 8300 is higher than for other I.R.S. forms.

⁶ See also 18 U.S.C. § 3571(b) and (c).

CC:CT:NO-169331-01

Referral Path

The referral path of § 6050I with respect to Forms 8300 depends on the nature of the particular violation. Generally, violations involving the failure to file Form 8300 or the supplying of false information on Forms 8300 fall within the scope of the IRM and Tax Division Directive 87-61, and may be directly referred to the United States Attorney's Office, unless the violation is specifically designated as one that must be referred through the Tax Division.⁷

Since there are no directives conferring Tax Division oversight regarding Title 31 violations nor restricting referral directly to United States Attorney Offices, referral of Title 31 violations are so directly referred without Tax Division approval.

Disclosure Limitations

Access to Taxpayer Information - Since the Service has investigative jurisdiction over violations of both reporting requirements, special agents can access the Form 8300 from either database. Form 8300 information gained via the TECS system is not governed by Title 26, whereas Form 8300 information accessed via CBRS, like other taxpayer information is protected by I.R.C. § 6103. Generally, if the investigation concerns violations of the internal revenue laws (e.g., § 6050I), relevant returns (e.g., Forms 1040) and files relating thereto may be accessed. See I.R.C. § 6103(h)(1). If, however, the investigation concerns violations of other Titles (e.g., Title 31), access to these same items is much more limited, and a court order might be necessary (See I.R.C. § 6103(i)). The result is changed if the special agent in charge determines that the Title 31 investigation is tax administration within the meaning of section 6103(b)(4). See IRM 9.3.1.4.3.1.1.2. In essence, this determination, which is often called the "related statute" determination, changes the Title 31 investigation into a tax administration matter, subject to section 6103. This permits greater access to returns and return information, however, all of the information so gathered by the IRS is subject to the protections and limitations of section 6103. Furthermore, if the information is to be shared amongst members of a multi-agency task force, as opposed to being used by Treasury personnel in a Title 31/Title 26 matter, an (i) order is necessary for use in the Title 18 nontax matters (e.g. bank fraud, bankruptcy fraud, etc.).

⁷ Tax Division Directive 87-61 directs that I.R.C. § 6050I violations involving the prosecution of the following must be referred through the Tax Division: accountants, physicians, or attorneys or their employees; casinos or their employees; financial institutions or their employees; local, state, federal or foreign public officials or political candidates; members of the judiciary; religious leaders; representatives of the electronic or printed news media; officials of a labor union; and publicly-held corporations and/or their officers. See also CCDM 31.4.14.5.

CC:CT:NO-169331-01

Disclosure of Form 8300 - The disclosure limitations vary depending on whether the Form 8300 reporting violation is being investigated under § 6050I or § 5331. If the special agent is investigating the violation under § 6050I, disclosure is governed by I.R.C. § 6103. Generally, the form and underlying files may be disclosed as part of a referral for grand jury investigation or prosecution. Absent a referral, although the information from the form may be disclosed in response to a written request, the form itself cannot be so disclosed. See I.R.C. § 6103(I)(15). Of course, the information, form, and files can be disclosed pursuant to a court order. See I.R.C. § 6103(i).

If the agent is investigating the violation under § 5331, unless the special agent in charge has made a "related statute" determination, disclosure is governed by 31 U.S.C. § 5319 rather than I.R.C. § 6103. Generally, § 5319 is less restrictive than § 6103. If a "related statute" determination has been made, disclosure is governed by § 6103.

Forfeiture

The Service has forfeiture authority under the Internal Revenue Code and Title 31 as well as the money laundering laws. See I.R.C. § 7301, et. seq., 31 U.S.C. § 5317⁸, 18 U.S.C. § 981, and Treas. Dir. 15-41 & 15-42. If the investigation is under § 6050I, § 7301, et. seq., can be used to forfeit the property used or intended for use in the violation. The difficulty with § 7301, et. seq., is that this forfeiture does not contain a tracing provision. If the investigation is under § 5331, § 5317 can be used for forfeiture. Finally, if in addition to the reporting requirement there is proof that the transaction violated the money laundering laws (18 U.S.C. §§ 1956 and 1957), § 981 allows for the forfeiture.

⁸ The Patriot Act enhanced the scope of Title 31 forfeitures by attempting to move all violations of the Bank Secrecy Act under § 5317. Unfortunately, a typographical error incorrectly references § 5331 as § 5333 (which does not exist).

CC:CT:NO-169331-01

Conclusion

As noted the substantive differences between the two statutes governing the Form 8300 are minimal. The differences in penalties, sentencing guidelines, statute of limitations, referral path, disclosure limitations and forfeiture, might make use of one statute more attractive than the other. To assist in such analysis, attached is a table summarizing those differences.

We offer our assistance in assessing the differences in particular cases. Should you have any questions or wish to discuss the matter further, please feel free to contact me or Jennifer Tosh of the Criminal Tax Division on (202) 622-4470.

Attachment

cc: Area Counsel (Criminal Tax)

Differences in Charging Form 8300 Violations Under Title 26 and Title 31

Criminal Violation	Title 26	Title 31
Penalties	<p>Failure to File: 5 years/ \$250,000 (\$500,000 for corp.)</p> <p>Filing False Forms: 3 years/ \$100,000 (\$500,000 for corporation</p>	<p>5 years/ \$250,000 (10 years/ \$500,000 if coupled with another violation or as a pattern of illegal activity involving more than \$100,000 in twelve months)</p>
Sentencing Guideline	U.S.S.G § 2S1.3	U.S.S.G § 2S1.3
Statute of Limitations	<p>Failure to File: 3 years</p> <p>Filing False Forms: 6 years</p>	5 years
Referral Path	Mostly direct to USAO	Mostly direct to USAO
Disclosure of Form 8300 Information	§ 6103(l)(15) limitations	No § 6103 limitations; <u>see</u> 31 U.S.C. § 5319
Forfeiture	I.R.C. § 7301, et. seq.	<p>31 U.S.C. § 5317(c) or 18 U.S.C. § 981, if based on predicate violation of 18 U.S.C. § 1956(a)(1)(B)(ii)</p>